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“It is hereby declared”:

the quiet reform of Canadian broadcasting law

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Introduction

Context

Canada remains a country in which media consumption is high.¹ Its broadcasting regulatory system and landmark Broadcasting Act is of particular interest to scholars of media law, not least because of the active role and constant activity of the statutory agency, the Canadian Radio-television and Telecommunications Commission (CRTC).² To European observers, an understanding of developments in Canada is useful, particularly in the light of how some European advocates have historically turned to Canada as a source of good practice on issues like diversity, cultural protection and combating US hegemony,³ and how platforms popularised in Canada (such as domestic cable TV) are disseminated throughout other regions.

Regulated broadcasting in Canada encompasses a range of radio and television broadcasters (public, private and community) as well as broadcasting distribution undertakings (BDUs) (cable, satellite and MDS). The purposes of the system and the regulatory approach are set out in sections 3 and 5 of the 1991 Broadcasting Act (reproduced for information as an appendix to this paper). Section 3 sets out the “broadcasting policy for Canada”, which then guides the CRTC in regulating what the Act calls a “single system” of broadcasting.

In this paper, I review a range of recent developments (setting aside the parallel debate on the role and financing of the public Canadian Broadcasting Corporation (CBC), with a slight emphasis on those developments related to the growth of (mostly Internet-based) ‘new media’; as I argue, dealing with the ‘problem’ of new media represents a particular challenge for the CRTC and to the Act. Taken together, these developments represent quite significant reform, and it can be argued that the mandate set out in the Act is undergoing a subtle transformation, whether that be through CRTC, industry or other action.

From Broadcasting Act to New Media

The 1991 Broadcasting Act, though based on the 1968 Act, brought some new issues to the forefront (such as community and Aboriginal broadcasting), although in the 17 years since it became law, the Canadian media environment has been transformed and transformed again, and the role of law - and not just broadcasting law, but international trade law, intellectual property and more - remains significant.

¹ CRTC Communications Monitoring Report 2008

<http://www.crtc.gc.ca/Eng/publications/reports/PolicyMonitoring/2008/cmr2008.htm>

² <http://www.crtc.gc.ca>. For a recent review of the CRTC’s role in broadcast regulation, see L Salter & F Odartey-Wellington, *The CRTC and Broadcasting Regulation in Canada* (Toronto: Carswell, 2008).

³ K Sarikakis, ‘Mediating Social Cohesion: Media and Cultural Policy in the European Union and Canada’ 24 *Eur Studies* 66.

Of course, while the 1991 Act is carefully designed as a ‘technologically neutral’ statute, with the intention of avoiding frequent visits to the legislature in the context of various new technologies, the treatment of ‘new media’ in Canada has proven to be quite a challenge. The CRTC’s “New Media” report of 1999 (and the subsequent “New Media Exemption Order” [NMEO]⁴ was an important milestone in the modern history of the Canadian broadcasting regulatory system, although almost ten years on, its relevance and impact is still being debated.

In adopting the NMEO, the CRTC ruled against the regulation of ‘content’ on the Internet, although the regulation of certain telecoms aspects would continue. This made Canada one of the first countries to consider content-based regulation of Internet services, and the rejection of such was significant and the subject of much discussion at the time.

The CRTC found that, while it had the jurisdiction to regulate certain types of Internet content, this would not be exercised and instead an exemption order issued in accordance with the Broadcasting Act. The starting point was the definition of “broadcasting” under the Act, and in particular the references to transmission, programs, “reception by the public” and “broadcast receiving apparatus”. As a program is defined as not including alphanumeric text, email and some Web content cannot be regulated under colour of the Broadcasting Act. On the other hand, content that could be defined as a program would still be considered ‘to the public’ despite the technological distinction between Internet and traditional services. Facing opposition to an exemption order from those concerned with Canadian content, the CRTC’s dual response was that such was unnecessary (due to the amount of content already available) and potentially unenforceable (due to the nature of Internet services). Factors of particular interest included the technological and user-experience differences between conventional and Internet media and the interactive or non-interactive nature of various services.

Recent developments

Television

Over-the-air television

A series of proceedings have come and gone in just two years, making the regulatory framework in some respects unrecognisable. A detailed and wide-ranging list of questions was posed in the notice of hearing on a “review of certain aspects of the regulatory framework for over-the-air television” (PN 2006-5). The hearings in late 2006 focused on a number of overall issues, including the role of the TV stations with respect to Canadian programming and the transition to digital and high-definition television. In 2007, the

⁴ Report on New Media, Broadcasting PN 1999-84 / Telecom PN 1999-14; call for comments on draft order PN 1999-118; exemption order PN 1999-197. Note that all references to Public Notices (PN) and Notices of Public Hearing (NPH) throughout this paper, apart from Telecom PN 1999-14, are to Broadcasting notices.

Commission announced a number of changes, most notably the eventual removal of advertising time limits, with the 12-minutes-per-hour cap increasing over a number years and ultimately to be removed in September 2009 ([PN 2007-53](#)). The CRTC did not accept the requests of the television stations to require BDUs to pay them a carriage fee; as we will see, this little bit of outstanding business was not long off the table. One important feature of Canadian broadcasting worth noting here is that the overwhelming majority of consumers access over-the-air television via some sort of BDU (mostly cable) - this does explain the importance placed on access by the CRTC through the years, but the financial dimension has never been resolved.

Canadian Television Fund

The Canadian Television Fund (CTF) is funded by the federal Government and by BDUs, typically as a condition of licence in fulfillment of Broadcasting Act policies; it is overseen by the Department of Canadian Heritage rather than the CRTC, though it is of course the CRTC decisions to require its creation and ongoing funding that are essentially its reason for existing. Prompted by a high-profile dispute which included difficulties highlighted by the Auditor General, the withholding of contributions by two major players (Quebecor and Shaw) and some hurried discussions in the Department of Canadian Heritage and at a parliamentary committee, the CRTC established an internal Task Force to report on the CTF and funding for Canadian programming in general in February 2007. This was published four months later, with a range of recommendations relating to the management of the CTF and the spending of contributed funds, with the suggestion of a “market-oriented private sector funding stream” attracting significant public attention. The CRTC indicated its “preliminary view” in favour of the recommendations, and responded with a further call for comments on the Task Force report ([PN 2007-70](#)), and announced in November 2007 ([NPH 2007-15](#)) that a public hearing would be held in February 2008 to discuss changes to the Fund.

Shortly after the public hearing was completed, the Minister for Canadian Heritage asked the CRTC for a report on the CTF (Order in Council [PC 2008-289](#)), which was delivered in June 2008. The CRTC then called for comments on proposed amendments to the ‘Benefits Policy’ (currently part of the 1999 Television Policy, [PN 1999-97](#)) which would enable such payments to be directed to the CTF ([PN 2008-62](#)). (“Benefits” in this context are payments made on the occasion of a transfer in ownership or control of a service; the CRTC does not allow the trading of licences, but requires the holder of a licence to obtain permission for it to be transferred to another party). However, this call now stands open until two weeks after the Government has responded to the June 2008 report (agreed by the CRTC on foot of requests from the CBC and various others on 3 September 2008) - and the upcoming federal election may delay this further.

The most significant issue remains the creation of two separate funds with separate boards, a public stream designed to fulfill “cultural objectives set out in the Broadcasting Act” and the more popular, market-oriented private fund; public money building the former and BDU

contributions the latter, with only public broadcasters would be able to draw from the public fund and private broadcasters from the BDU-financed one. (There is, of course, a 'new media' dimension too, in that the creation of a ring-fenced fund for programs for new media platforms remains under discussion: PN 2008-58).

BDU Hearings

Meanwhile, the BDUs themselves are the subject of a further major review (PN 2007-10), with what the CRTC charmingly called a "constellation of issues" being the subject of discussion. The hearings for this review stretched across twelve days and the formal record of comments and reply comments is lengthy. The commissioned Dunbar-Leblanc report of regulatory measures is playing a major role in these proceedings, which have not yet concluded. In the thorough report, commissioned by the CRTC as a review of the effectiveness of all regulatory measures, a number of reforms were proposed, including the revisiting of the distinctive Canadian features of simultaneous substitution and genre protection.

The "fee for carriage" question raised and apparently disposed of during the over-the-air review of 2006/7 was debated at great length in the written submissions and the oral hearing. Furthermore, additional issues appeared to become more prominent during the hearings, including the regulatory treatment of video-on-demand; the CRTC even used the language familiar to EU media lawyers of querying the "delineat(ion of) those features that distinguish VOD and [subscription VOD] from linear programming services". The importance of the forthcoming CRTC decision is underlined by its decision to renew all over-the-air television licences for a year and to schedule licence renewal hearings for 2009, "given the impact that the determinations in this review may have on (them)".

Radio

Probably the most significant change in the regulation of Canadian radio this decade came in the new Commercial Radio Policy (PN 2006-158), which continued a trend of scaling back specific regulatory requirements (at its height, the CRTC regulated the exact format of radio stations quite tightly) while retaining the essential elements of Canadian content requirements. The CRTC's approach to Canadian talent on radio can be pointed to as an illustration of how it is not possible to understand Canadian broadcast regulation without paying close attention to the section 3 Broadcasting Policy.⁵

Digital radio remains substantially underdeveloped in Canada, with issues relating to frequency allocation appearing to be the most significant obstacle. Although a UK observer might feel somewhat cheered by the fact that broadcast-style digital radio (DAB) has been available in this jurisdiction for some years (also simulcast via Freeview, cable and satellite), it is not the case that no digital services are available: 'pay radio' via BDUs has been available

⁵ Dunbar-Leblanc report (2007) <http://www.crtc.gc.ca/ENG/publications/reports/dunbarleblanc.htm> 201-202.

for some time in Canada, and a service mostly unknown in Western Europe, satellite radio (predominantly used in cars), has become a noteworthy feature of the North American radio market. It is therefore the regulation of satellite radio, with its hundreds of music-only channels, that has made a particular impact on public consciousness, influenced in no small part by the outraged reaction of various parties.

The regulation here, though, takes place by way of condition of licence and not regulations of general application (meaning that, for example, the Dunbar-Leblanc report (discussed below) declined to review these conditions, simply noting that this was a tailor-made regulatory approach).⁶ The specific conditions of licence, and the mere fact that a licence was granted, caused great concern to some stakeholders. The two licenced satellite services, while Canadian-controlled, are effectively Canadian versions of the two major US providers (XM and Sirius), using the same satellite systems, though are required to ensure that 10% of their channels available to Canadians use Canadian content. Approval did not come until 2005 (well after the US services launched) and opponents of the decision called on the federal Government to intervene (the Government declined to do so). Subsequently, the CRTC also permitted a number of BDUs to carry satellite subscription radio services. The recent merger of the US XM and Sirius systems raises interesting questions as to the future of Canadian satellite radio.

The growth of Internet radio continues - whether simulcasted streaming, Internet-only streaming or the most recent area of growth, podcasting (downloadable programmes typically heard via a portable audio player such as an iPod). It is particularly international in its scope.⁷ Indeed, the latest releases of Apple's Internet-enabled iPhone (and to some extent the related iPod Touch which accesses the Internet through wifi alone) have prompted some commentators to highlight how easy it is to use it as a portable radio device, bringing the era of full Internet radio ever closer. While radio streaming has been a feature of Internet use for many years, and long before the popular adoption of Internet video or TV services due to the lower bandwidth requirements, it has been effectively confined to those accessing the Internet through fixed connections (dial-up, then ISP broadband and sometimes wifi hotspots). Now, though, iPhone customers have the ability to access most radio streams, and indeed face no additional charges in most markets due to the availability of 'unlimited' data plans. While this was not possible until Apple itself implemented a software and design change that allowed the creation of third-party applications, and indeed could be restricted for non-specialist users by future Apple or wireless carrier action (a particular danger requiring further consideration), the general direction is towards personal radio uses moving towards mobile devices.

The CRTC has recognised the rapid development of radio services through alternative platforms, refusing the cellphone industry's request (as part of the mobile exemption order proceedings discussed in the section below) to include all broadcasting services in the order.

⁶ Dunbar-Leblanc 211-212.

⁷ *Perspectives on Canadian Broadcasting in New Media: a compilation of research and stakeholder reviews* (2008) <http://www.crtc.gc.ca/Eng/media/rp080515.pdf> [Perspectives] [89-90] and accompanying tables.

It found that while technological limitations restricted the effect of the exemption order within TV, such an order would have exempted effectively all radio services (including subscription radio) from regulation as it was technologically trivial to provide radio services via mobile devices.⁸

Mobile

The Broadcasting Act allows the CRTC to exempt particular activities from regulation if doing so would not be an effective way of achieving the policy objectives of the Act. Famously, the NMEO was an exercise of such power. Recently, the CRTC had cause to review the application of the NMEO and also consider a further order - both decisions related to television-like services available via mobile phones and related devices.

This particular discussion was prompted by the very public promotion of 'mobile TV' services by wireless carriers and a resulting letter from the Canadian Association of Broadcasters (CAB) seeking clarification on the regulatory status of such services. In response, the CRTC issued a call for comments in mid-2005 (PN 2005-82). The response was a pair of decisions published the following year.

In the first decision (PN 2006-47) the CRTC ruled that certain mobile TV services were, although included in the statutory definition of broadcasting, exempted from regulation under the NMEO, as they fit the definition of services "delivered and accessed over the Internet". These services, offered by Canadian wireless carriers with assistance from MobiTV (a US service), were amusingly talked down by the carriers, who were at pains to explain how the quality is low and the screen is small⁹ (language not reproduced in their advertising material, at least to this author's knowledge!). Customers could view TV content via their mobile handsets, typically channelled by MobiTV via the Internet to their carrier and then over the carrier's wireless network for the 'last mile'. Opposition came from broadcasters and related industry (presumably concerned about competition with an effectively unregulated industry) and from those concerned with cultural and linguistic issues (typically arguing that the effectiveness of CRTC supervision on Canadian content, bilingualism, etc would be diminished by 'extending' the NMEO to TV via mobile phones).

This did not dispose of the matter, though. Mobile broadcasting was and is not confined to services delivered via the Internet. The CRTC, having decided that mobile broadcasting in general did not require regulation at the present time, therefore simultaneously proposed a further exemption order to exempt non-Internet mobile TV from regulation (along similar lines to the original NMEO but as a separate Order rather than an amendment). After a relatively uncontroversial process (with the policy issues noted in PN 2006-47 being reaired by many parties), the Commission issued a new Order in these terms (PN 2007-13). Understandably, the wireless industry criticised the draft order on the grounds that it was

⁸ PN 2007-13 [21]

⁹ The 'Lemay-Yates report' commissioned by the Canadian Wireless Telecommunications Association, referred to in PN 2006-47 [12].

potentially underinclusive (in that future handsets etc offered by wireless carriers would not be exempted) and the broadcasting industry criticised it on the grounds that it was potentially overinclusive (in that future offerings from the carriers that would resemble domestic equipment for receiving TV signals would be exempted). The CRTC went some way towards satisfying these competing claims, removing specificity from the reference to handset types but adding a proviso that the order related to ‘point to point technology’ with a ‘separate stream of broadcast video and audio to each end-user’. (The CRTC also agreed to include Canadian ownership and prior consent of broadcaster restrictions, but rejected submissions proposing Canadian content provisions and services for the deaf).

An issue not yet resolved is the positions of the mobile carriers, not yet regulated by the CRTC (due to the exemption orders) but occupying an influential position vis a vis the content accessible to Canadian audiences via mobile services. Broadcasters have already criticised the fact that the carrier requires content producers and services to affiliate with them, questioning whether the carrier is properly acting as an ISP or as a BDU-like gatekeeper.¹⁰ This theme was picked up in *Perspectives*, with the CRTC recording complaints from stakeholders about unreasonable denial of access to platforms by carriers.¹¹ Furthermore, although the CRTC was prepared in 2006 to accept that users would not usually replace conventional TV watching with mobile TV watching (at least in terms of the times and circumstances of viewing),¹² carriers have this year promoted the availability of full episodes as a feature of mobile TV; provocatively, one carrier (Bell Mobility) has cooperated with the (infamously not licenced in Canada and US-based) HBO for such services.¹³

Diversity of Voices

Cutting across the various platforms are the questions of media diversity, concentration and control. The ‘Diversity of Voices’ proceeding was launched alongside a discussion of journalistic independence in 2007. The CRTC frankly acknowledged in its press statements that it would hold a hearing and invite public comments “in light of the current wave of consolidation in the Canadian broadcasting industry”.¹⁴ This was a reference to the (then proposed) purchase of CHUM by CTV Globemedia, of Alliance Atlantis by CanWest and other pending transactions; the CRTC also pointed out that all such proposed transactions would be assessed with reference to existing policies, in the interests of “procedural fairness”. The hearings attracted significant public attention. It is of course worth noting that two very significant parliamentary reports (“*Our Cultural Sovereignty*” from the Standing Committee on Canadian Heritage of 2003 and the Canadian News Media report from the Senate Committee on Transport and Communications of 2006), both of which dealt with these issues, had not been acted upon in any meaningful way.

¹⁰ PN 2006-47 [25] and [15].

¹¹ *Perspectives* [230]. Notably this paragraph was a standalone section immediately after a lengthy discussion of network neutrality (on which see below).

¹² PN 2006-47 [43].

¹³ ‘HBO and Bell deliver premium TV programming to mobile phones’ (press release) (1 April 2008) <http://www.reuters.com/article/pressRelease/idUS172457+01-Apr-2008+PRN20080401>

¹⁴ ‘CRTC to undertake a review of issues relating to the diversity of voices in Canada’ (press release) (13 March 2007) <http://www.crtc.gc.ca/eng/news/releases/2007/r070313.htm>

In January 2008 (PN 2008-4), the results were announced: much of the existing suite of policies remained in place, but a prohibition on the ownership of any two local radio stations, TV stations or newspapers serving the same market was proposed and (subsequently) confirmed, a limit of 45% of television share introduced, and a policy adopted preventing agreements between undertakings “that would result in one person effectively controlling the delivery of programming in a market”. However, given that so many transactions (or to be precise, changes in effective ownership of licences) had been approved, it is understandable how opponents of media concentration argued¹⁵ that the new restrictions would not have significant practical impact on the Canadian media situation.

A New (Media) Perspective

In June 2006, the federal Government instructed the CRTC to compile “a factual report on the future environment facing the Canadian broadcasting system” (Order in Council PC 2006-519). Requesting comments from the public on what should be included in this report (PN 2006-72), and commissioning a number of research studies, the CRTC published its report [Future Environment] in December 2006. While much of it is in similar terms to the regular Monitoring Reports produced by the CRTC, it also provides a useful overview of the positions of the various interested parties, and a considerable chapter is dedicated to the submissions received regarding policy and legislative matters. The NMEO was of course debated in this section, with the CRTC finding that there was no need for an immediate review but that it would monitor the situation closely, moving to a review if sufficient evidence (regarding Canadian presence or adverse impact on regulated undertakings) came to light. In this regard, it launched a ‘New Media Project Initiative’ in 2007, which led to the “New Media Perspectives” report [Perspectives] being published by the CRTC in May 2008. This report reviewed changes since the Future Environment report specifically in the area of new media.

Although the consistent approach of the CRTC has been that regulation is unnecessary due to the differences between existing media and new media, the Perspectives report does show a sharp change in tone. Relying on research data, it is noted that consumption is climbing and the impact on conventional broadcasting is becoming apparent.¹⁶ Particular concern is expressed over how there is unbalanced competition between regulated and unregulated undertakings.¹⁷ Although some have summarised the new environment as Canadian consumers finding their voices¹⁸, concern is coming from many quarters about what this means for the coherence of the regulatory system and the effectiveness of the Broadcasting Act. Statistical information suggesting that high users of new media (both audio

¹⁵ See for example ‘Critics slam CRTC cross-media ownership policy’ (*Toronto Star* 16 January 2008) <http://www.thestar.com/article/294394>

¹⁶ Perspectives [3].

¹⁷ Perspectives [9].

¹⁸ P Dinsmore, ‘New Paradigms in TV Regulation’, paper delivered to *New Developments in Communications Law & Policy* 2006. The author was and is a vice-president (regulatory) at Rogers Communications.

and video) in Canada are less likely to be users of traditional broadcasting (contradicting earlier research) is certainly making an impact.¹⁹

It is argued in the report that important developments in ‘enablers’ of new media services not detailed in the Future Environment are relevant: examples include reliable geolocation and digital watermarking.²⁰ Of course, all of these technologies existed to some extent at the time of the Future Environment, though it is clear that the difference is perceived as the widespread availability or effectiveness of the various solutions.

Following the publication of the report, the CRTC issued what it referred to, cautiously, as a “call for comments on the scope of a future proceeding on Canadian broadcasting in new media” (PN 2008-44). It set out a number of questions:

What is the scope of new media broadcasting?

Are incentives or regulatory measures required for the creation and promotion of Canadian new media broadcasting content

Are there any barriers to accessing Canadian new media broadcasting content?

What other broadcasting policy objectives should be considered within the scope of the proceeding?

Even the necessity for any discussion is contested by some. For example, the “Canadian ISP Alliance” (CISPA), made up of a range of major ISPs and formed specifically for the purpose of responding to the CRTC proceedings, makes this case against carrying out any review. They assert that neither Parliament nor the federal government has requested a review nor a reassessment of existing regulations.²¹ It takes a brave - and perhaps foolhardy - party to make a case like this, particular when the CRTC clearly possesses the legal authority to carry out studies (sections 14(1) and 18(3) of the Act in particular), not to mention the clear statement in the NMEO, Future Environment and Perspectives and related proceedings that the CRTC would revisit the exemption if appropriate.

¹⁹ Perspectives [65]; see also Salter & Odartey-Wellington 605.

²⁰ Perspectives [112].

²¹ CISPA submission re PN 2008-44 [27].

Net Neutrality

The CRTC is also dealing with the network neutrality issue in a fairly serious way, both as an aspect of broader policy discussions and in its own right. Net neutrality is, among the range of Internet legal issues, one of the most high-profile in the US, featuring regularly in influential broadcasts such as Comedy Central's *The Daily Show* and the subject of regular pronouncements by presidential candidates. While the debate is conducted at various levels, and there are differing definitions of what exactly is being proposed or opposed, those who favour legal support for net neutrality argue that the State should prevent ISPs from restricting the content received by subscribers or favouring content providers. Opponents typically fall into two camps, those who argue that legislation is unnecessary as consumer and/or economic behaviour will prevent abuse and those who argue that the ISP should be able to act in this way (normally as a response to the resources necessary to support high-bandwidth content).

Indeed, it was a Canadian telecommunications carrier and ISP (Telus) who provoked one of the earliest recorded net neutrality disputes, when it prevented its subscribers from accessing the website of the trade union representing its own workers during an industrial dispute.²² Although this was resolved with haste, subsequent events in Canada have provoked a discussion of possible policy responses, despite initial scepticism that the issue was one for government at all. Documents disclosed under freedom of information law show how Industry Canada supported a 'market forces' approach and advised the Minister against supporting a policy response.²³

The CRTC issued a forbearance order relating to ISPs in 1999 (following the New Media report), and does not regulate the rates charged to customers - although it does retain the ability to act against unjust discrimination and undue preference under the Telecommunications Act. In *Perspectives*,²⁴ the interaction between this state of affairs and ISP behaviour was summarised, noting "increased discussion, research and regulatory investigation" into the actions of ISPs, not just in Canada.

Indeed, in 2008 the Canadian Association of Internet Providers (CAIP), representing non-incumbent ISPs, urged the CRTC to prevent Bell Canada from traffic shaping/throttling. This refers to Bell's actions in identifying peer-to-peer traffic during certain hours of the day and lowering the priority given to such packets across its network. The motivation for the CAIP complaint was that their member ISPs buy Internet access (wholesale) from Bell for resale to their own customers and thus they were in practice required to sell Bell policies despite disagreement with or consumer complaints about such.²⁵ A decision is pending and is expected before the end of the year. In a June speech, the chair of the CRTC referred to

²² 'Telus cuts subscriber access to pro-union website' (*CBC News* 24 July 2005), <http://www.cbc.ca/canada/story/2005/07/24/telus-sites050724.html>

²³ Summarised in M Geist, 'Bernier's troubling stand on net neutrality' (*Toronto Star* 12 February 2007) <http://www.thestar.com/article/180608>

²⁴ *Perspectives* [219-229].

²⁵ E.g. 'Bell defends 'shaping' Internet traffic' (*Toronto Star* 31 May 2008) <http://www.thestar.com/article/434465>

these proceedings and suggested that a broader consultation on net neutrality was an option before it.²⁶ ISPs, though, continue to insist, in the context of the regulation of new media, that they play a “passive role” in delivering new media content²⁷ - although it is interesting merely to note the overlapping membership of some ISPs in both CAIP and CISPA (e.g. MTS Allstream).

How this issue develops is of quite some importance to Canadian media regulation. The high-bandwidth content that acts as a trigger for certain net neutrality issues is often, by its nature, the same type of content that was recognised in the NMEO as coming under the statutory definition of broadcasting and resembles, replaces or competes with fully regulated TV and radio services. In the UK, the BBC’s wildly popular iPlayer service (allowing UK users to view and download (with restrictions) TV programmes already broadcast) has prompted ISPs to issue statements of concern over the burden it places on their networks; the CBC in Canada has already experimented with some peer-to-peer distribution. Indeed, the issue has already been aired in the context of the CRTC’s review of new media, with content creators expressing concern that ISP traffic management would limit the development of Canadian new media content accessed via the Internet,²⁸ and - to the surprise of some observers and over the dissent of Conservative members - the House of Commons committee charged with reviewing the CBC included a discussion and strong recommendations in favour of net neutrality (in the context of public broadcasting) in its February 2008 report.²⁹

Neutrality In Perspective

Suggestions have been circulated, notably in Perspectives, that ISPs should be required to make a contribution to the development of Canadian content.³⁰ This is in some ways a traditional Canadian approach, with many participants in the communications industries having been required to make payments to talent funds over the history of Canadian broadcasting. Assuming this approach is workable and that there is political will to pursue it, it does suggest that there may be a potential for a negotiation of a range of issues, including contributions, network neutrality and visibility of or access to Canadian content, as part of an holistic response.

However, the challenge faced by proponents of this approach is underlined by the submission of the CISPA, who lecture the CRTC: “It is important for the Commission to recognize and understand that it does not have the authority under the Broadcasting Act or the Telecommunications Act to impose such a contribution regime on ISPs in furtherance of the broadcasting policy objectives”.³¹ The CRTC frequently dismisses such challenges with

²⁶ Speech to the Canadian Telecom Summit (17 June 2008)
<http://www.crtc.gc.ca/eng/news/speeches/2008/s080617.htm>

²⁷ CISPA [35].

²⁸ Perspectives [37].

²⁹ Report of the Standing Committee on Canadian Heritage, February 2008.

³⁰ Perspectives [190].

³¹ CISPA [31].

ease,³² and has been at pains to avoid suggesting any limit to its jurisdiction over providers of Internet 'Broadcasting Act content' throughout its engagement with new media, so its response to this broadside - and the accompanying legal opinion - is eagerly awaited.

The Challenge: Leaving The System?

"This is the age of new media, of Google, Yahoo, You Tube, Facebook, Joost and of dozens more unregulated enterprises emerging or in the development stage. Regulated enterprises like Citytv find themselves sufficiently challenged by the need to succeed financially while meeting legislated cultural imperatives without having to shoulder the additional burden of inflexible regulatory dictates."

Former CRTC Commissioner Stuart Langford was dissenting from a decision to require CTV Globemedia to dispose of the CityTV channels as part of its takeover of CityTV parent CHUM in 2007. (Decision 2007-165). While he joined the majority in approving the transfer in control of the CHUM licences, he would also have allowed CTV Globemedia to take over CityTV's licence, on the grounds that it is difficult enough to survive in the competitive urban markets and that the proposed purchase would have provided funding and stability. (Ultimately, the CityTV channels were purchased by another media corporation with diverse interests, Rogers).

This interesting point is one that has started to make its way into discussions of communications policy in Canada, though it reflects a long-standing argument about evolving technologies. The argument is that because conventional radio and TV has to compete with the Internet services not regulated by it via the Broadcasting Act, it is necessary to be flexible in applying law and regulatory policies to regulated broadcasters. Indeed, this has been a major factor in the redrafting of the EU's Television Without Frontiers provisions as the new Audiovisual Media Services directive, such as the decision to loosen advertising restrictions on the 'linear' or 'scheduled' (i.e. significantly regulated) services while clarifying or introducing minimal regulation for the non-linear or on-demand services.

It has furthermore been suggested that there is a reasonable possibility that Canadian audiences will "leave the regulated broadcasting system", for example choosing to view HDTV and similar content from Internet or US sources rather than via Canadian-licensed and controlled services.³³ The latter is potentially capable of being controlled - and indeed reflects an issue with which the CRTC and Canadians are quite familiar, not least from the 1990s debates over direct-to-home satellite services and the subsequent litigation about 'grey market' devices.³⁴ However, the control of legitimate "high quality Internet TV" is certainly a significant one given the legal power of the CRTC to regulate such and the actual decision to refrain from doing so in the NMEO. As for legally dubious Internet sources,

³² See for example the rejection of BDU submissions that the CRTC lacked the authority to impose a fee for carriage with respect to over-the-air television, PN 2007-73 [22-3].

³³ Dinsmore [28].

³⁴ see e.g. section 9(1)(c) of the Radiocommunication Act, as discussed in *ExpressVu v Rex* [2002] SCC 42.

author of the recently released *Two Solitudes* report³⁵ Alan Sawyer briefed newspapers in advance of its publication that in most cases, TV programmes are available through peer-to-peer services. He added that it was his belief that Canadian audiences use peer-to-peer service for reasons including the lack of alternative, legitimate access to programmes in alternative formats.³⁶

With those warnings in mind, we turn to the non-CRTC aspects of broadcast regulation, before concluding with some observations on the evolving role of the CRTC.

Outside The CRTC

Convergence?

Of course, the CRTC has for some time found itself dealing with issues that are not part of the familiar broadcasting-regulation environment, everything from people with disabilities to municipal land. However, issues that would have been seen as the domain of the broadcasting regulatory system - or indeed of the CRTC as a whole, i.e. including its telecommunication functions - are frequently being dealt with elsewhere. 'Convergence' may have had an important impact on the CRTC's own activities (though the day-to-day work is still in some respects split between separate divisions, with a recent decision to create a single Policy Development and Research sector worth noting³⁷), and the co-operation between the CRTC and Competition Bureau has been well discussed - but even outside of those expansive borders, interesting things are happening.

In *Perspectives*, a perceptive paragraph summarises a difficulty in the legislative background as well as the conceptualisation of what is media:

Many stakeholders have raised the fundamental question of how to define new media broadcasting. Some stakeholders have suggested a broad definition to capture all audio-visual programming online regardless of the method employed to retrieve it, such as downloading, streaming, or peer-to-peer distribution. Others, however, caution that such a broad definition could include digital retail activities (for example, digital music, television and film purchase), which they argue should not be considered broadcasting for the purposes of furthering the broadcasting policy objectives of the Act.³⁸

It was argued in *Dunbar-Leblanc* that a "national policy for electronic media" is necessary; this would encompass tax credits, copyright and other issues. They suggested that the

³⁵ 'Changing channels: alternative distribution of television content', made available by the CRTC without comment on 9 September 2008 and not considered in this paper.

³⁶ 'Canadians skirt law to view American TV' (*Toronto Star* 5 July 2008) <http://www.thestar.com/article/454964>

³⁷ 'CRTC realigns its organizational structure' (press release) (15 July 2008)

<http://www.crtc.gc.ca/eng/NEWS/RELEASES/2008/i080715.htm>

³⁸ *Perspectives* [32] and [171].

CRTC consulted with other departments and agencies to bring this into being. Perhaps a template for this approach is the “New Media Advisory Committee” set up by the CRTC as part of the New Media Project Initiative, for the purpose of providing ‘guidance and advice’ to this specific project. It encompasses officials from both parent departments (Industry, Canadian Heritage) as well as other general (Competition, Copyright) and media (NFB, Telefilm) agencies. However, the concerns expressed by others regarding a drift away from public participation and scrutiny (considered later in this paper) cannot be ignored if such an approach is to be pursued by the CRTC and other public authorities.

Bill C-10 and Film Tax Credits

The ‘C-10 controversy’ is a particularly timely example of how Canadian media policy pops up in the most unusual of places, and shows how not all issues of scope and definition are technology-related. The controversy pertains to Bill C-10, “An Act to amend the Income Tax Act, including amendments in relation to foreign investment entities and non-resident trusts”, reintroduced by the Minister of Finance in October 2007 after the proroguing of Parliament. The primary purpose of the bill was, according to the Minister, the preventing of tax avoidance and deferral, though it also was presented as including “a number of technical amendments to update the Income Tax Act and ensure the law reflects government policy”.³⁹ One of these technical amendments would require the Minister for Canadian Heritage to, before certifying a film for the purposes of a well-known tax credit scheme, be satisfied that “public financial support of the production would not be contrary to public policy”.

The opposition Liberal Party argued that amendments to the Government’s proposals were necessary, relying not just on concepts of artistic freedom but also the protection of the film industry and its economic viability.⁴⁰ The smaller New Democratic Party, which had followed the issue from early in 2008, focused on the censorship dimension and attacked the Conservative Party for attempting to introduce ‘subjective’ socially conservative tests into public policy.⁴¹ Although the responsible Minister had argued that it was necessary to remove the ‘absurdity’ of public funds being spent on films that violated federal criminal law (noting of course that the Criminal Code of Canada does restrict expression on certain well-litigated grounds such as obscenity and hate speech), an aide later confirmed to a newspaper that no application for support had ever been received for a film that was suspected of such an offence.⁴²

Journalist Mark Steyn, though personally embroiled in a free speech controversy over his media writings on Islam being the subject of complaints to the Canadian Human Rights

³⁹ ‘Canada’s New Government Strengthens the Income Tax System’ (press release) (9 November 2006) <http://www.fin.gc.ca/news06/06-065e.html>

⁴⁰ ‘Liberal Senators Release Amendments to the Conservative Censorship Bill’ (press release, 18 June 2008) http://www.liberal.ca/story_14094_e.aspx

⁴¹ ‘Statement by Bill Siksay on Bill C10 and Censorship’ (press release, 29 February 2008) http://action.web.ca/home/billsiksai/en_alerts.shtml?x=114316

⁴² ‘Bill C-10 fixes non-existent problem’ (*Toronto Star* 10 March 2008) <http://www.thestar.com/article/326759>

Commission), argues that the issue is not one of speech but of the State's control of its own spending.⁴³ His colleague Andrew Coyne puts it simply: "[it's] not censorship - it's judgment".⁴⁴ Even setting aside this debate, though, it is not difficult to see how this is a broadcasting-regulation issue. That is to say, the proposed actions would have an impact on the production of Canadian films and - in particular in the context of the promotion of Canadian content through broadcasting law - the type of materials made available to and viewed by Canadian audiences.

Bill C-61 and Copyright Reform

Those who study Canadian copyright law have seen the debate on the reform of the Copyright Act go from a hypothetical discussion through a series of abortive attempts all the way to a high-profile controversy, helped along its way by rallies, Facebook petitions and a crusading law professor (Michael Geist of the University of Ottawa)⁴⁵ becoming a very modern academic celebrity - with most of the activity being in opposition to the Government's proposals. The proposed legislation (Bill C-61) now falls due to the calling of a federal election, but already it seems that the debate will in fact carry through into the election campaign itself. While a detailed consideration of the Bill is beyond the scope of this paper, a number of its components, including provisions on uploading, anti-circumvention and format shifting, certainly have the potential to affect the broadcasting landscape.

The law regarding intellectual property, and copyright in particular, is undoubtedly an important one for broadcasters, but is even more so for new media producers. In the absence of CRTC regulation, it is tempting to suggest that a video on the Internet is "unregulated" in Canada - aside from laws of general application such as provisions of the Criminal Code, the fact that it is virtually impossible to produce new media content without dealing with a basket of rights means that the lack of a CRTC licence does not equal no legal constraints.

The ISPs faced an early challenge in this regard, when the Copyright Board, on application from a society of composers (SOCAN), set a 'tariff' pursuant to the Copyright Act, payable by ISPs to copyright holders, appealed all the way to the Supreme Court.⁴⁶ Ultimately, the Court found that ISPs were not implicated by copyright law in respect of the downloading and streaming activities of their customers and therefore the tariff did not have a legal basis. Undeterred, SOCAN continues to seek a tariff applicable to the producers of Internet audio content (podcasters, broadcasters, etc), and the Copyright Board has dealt with part of the application, though further court challenges are anticipated and not all aspects have yet been disposed of. Indeed, currently proposing payments of 25% of revenues or operating

⁴³ M Steyn, 'I have an idea for you, Cronenberg' (*Maclean's* 12 March 2008)

⁴⁴ A Coyne, 'Man the barricades! Film tax credits are taking fire!' (*Maclean's* 6 March 2008).

⁴⁵ See <http://www.michaelgeist.ca> for full coverage.

⁴⁶ *SOCAN v CAIP* [2004] SCC 45.

expenses (minimum \$200 per month) for such websites (20% for pay audio-style services and 15% for radio-like Internet-only services or simulcasts of conventional radio).

In the US, similar proceedings have led to some regulation of the nature of programming on Internet radio services (tracks per hour by a particular artist, etc) that certainly blur the lines between IP law and the core functions of a media regulatory system. So for now, the fact that some music services (digital pay audio and satellite radio, for example) are ‘controlled’ by both CRTC and Copyright Board, while others (Internet radio) by Copyright Board only, means that decisions made by the Board take on particular importance. A related point is made by broadcasters, arguing that tariffs set by the Copyright Board for the use of copyright-protected content in new media could stifle innovation and prevent consumer adoption.⁴⁷ This is not the first time that there has been interesting interactions between copyright and broadcasting law in Canada (BDUs, for example, are covered by sui generis copyright provisions on the retransmission of distant signals) although already the added dimension of the non-regulation of new media has led to some complications, when the Copyright Act was amended to prevent online retransmitters (unregulated due to NMEO) from benefitting from these provisions.

Observations and Challenges

Smart Regulation

The Dunbar-Leblanc report restates the familiar provisions of the Broadcasting Act, noting that the CRTC is required to implement a range of objectives “without any guidance from Parliament as to where to place its emphasis”.⁴⁸ However, particular attention is given to section 5(2)(g) of the Act:

The Canadian broadcasting system should be regulated and supervised in a flexible manner that ... is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

Although this section is mentioned again and again in the report, also of note is the discussion of “Smart Regulation” principles, developed by a Government committee though not articulated in legislation of general application. In the case of telecommunications, the Government-appointed Telecommunications Policy Review Panel reported favourably on their possible application to telecommunications regulation - and the Policy Direction⁴⁹ issued by the Government to the CRTC *in respect of the Telecommunications Act* codified them. It is therefore puzzling to see how the authors of the report could find that “while the circumstances of the telecommunications and broadcasting industries regulated by the

⁴⁷ Perspectives [166].

⁴⁸ Dunbar-Leblanc vi.

⁴⁹ Order-in-Council PC 2006-1534.

Commission may be very different, these principles of smart regulation are equally applicable and adaptable”; while the actions of the Government in issuing the Policy Direction are open to criticism, it is surely more appropriate to change the philosophy of regulation by legislation or by Policy Direction, and therefore discussion of “Smart Regulation” for broadcasting outside of the democratic safeguards utilised in the case of telecommunications regulation. Note though that the report itself defends the need for some onerous regulatory requirements and indeed suggests the extension of a few, meaning that it defies easy categorisation as a full-throated call for deregulation.

The Policy Direction, too, reads very differently to the policies set out in the primary legislation. It requires the CRTC to rely on market forces “to the maximum extent feasible” and is virtually silent on non-economic objectives of the regulatory system. The Government has also issued directions to the CRTC on two specific telecommunications matters in the last two years - one on the regulation of VoIP and one on local telephone rates, both perceived as deregulatory. The philosophical shift reaches its natural conclusion in the comments of the Competition Commissioner, Sheridan Scott, who told the telecommunications industry that “regulation should always be viewed, not as a first step, but as a last resort”.⁵⁰ That said, the Government has recently retreated from an ambitious recommendation in the Competition Policy Review Panel’s report “Compete To Win”⁵¹ that restrictions on foreign investment in telecommunications and broadcasting should be liberalized.⁵²

Participation

Dunbar-Leblanc criticise the CRTC’s public hearings for wasting “costly public hearing time” by allowing what they refer to as non-applicant intervenors (which for many hearings include competitors, trade unions, community groups, other media interests, NGOs and more) to speak. They argue that much of the material presented duplicates the submissions of the applicant or a fellow intervenor, and that the evidence is already on the record through written submissions. While this is a technically accurate analysis of the situation, it is not appropriate to view public hearings in terms of technicalities alone. The CRTC’s hearing processes are a site of significant stakeholder and community engagement and, given the context of the CRTC as an arms-length agency, form a key part of its democratic legitimacy. Indeed, of any agency, one dealing with media can only expect to hear from a diverse range of interests. What is duplication to some observers (“abuse of process” according to Dunbar-Leblanc, who recommend that the CRTC should be quicker to refuse an intervenor an opportunity to speak) is the chaotic but democratically valuable business of popular participation in government to others. From an entirely different perspective, Salter & Odartey-Wellington suggest that although the CRTC universe can become an ‘insider’s world’, particularly given the complexity of some matters, the problem would be lessened if

⁵⁰ Speech to Canadian Telecoms Summit, reported in CBC Special Report: Disconnected (9 September 2008) <http://www.cbc.ca/technology/story/2008/09/05/tech-disconnected-main-b.html>

⁵¹ <http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home>

⁵² ‘Harper promises to relax foreign investment rules’ (*Globe and Mail* 12 September 2008).

commissioners themselves were able to be advocates.⁵³ Paying tribute to former Commissioners who were prepared to speak publicly in support of the social and political goals of the Broadcasting Act, they suggest that this is a matter of quite some concern.

The Centre for Canadian Studies at Mount Allison University's 'Canadian Democratic Audit' found that ICT policy (as distinct from broadcasting policy and, historically, telecommunications policy) is formed in an environment "disconnected from the [Canadian] tradition of relatively democratic communications policy-making".⁵⁴ A number of observers have analysed the evolution of ICT policy making, with the role of the private-sector dominated National Broadband Task Force coming in for particular criticism,⁵⁵ although one study of the history of Canadian 'computer policy'⁵⁶ records how attempts in the 1960s and 1970s to take a utility-based approach (i.e. that computer services would be regulated and promoted in a similar way to utilities like electricity and water) failed, despite initial enthusiasm on the part of Government. (Of course, it was not particularly well acknowledge at that stage that ICT policy would interact with broadcasting to such an extent). Even then, concern was expressed that action was necessary to enable new technology to meet the social and economic needs of the state (perhaps as far from the prevailing modern model technological determinism where the new technology requires the state to change its policies!) - but these statements were quickly replaced by a favouring of competition and free markets. In this context, the New Media decision is condemned by the Audit, not necessarily for its result but for how subsequent developments have failed to be debated and analysed through the CRTC's processes.⁵⁷

The argument here is that what is valuable about the Canadian approach to communications policy - wide engagement, significant attention to cultural factors, aspects of deliberative democracy - is being ignored when ICT policy is formed. Given that more and more of the traditional broadcasting, cultural and communications policy areas are being superceded by or integrated with the ICT 'file', the question surely is how much of the 'old' approach can survive? Will the integration of broadcasting and ICT policy-making mean that the former will change the latter, or is that simply too much to hope for?

CRTC powers and the role of the Act

The powers of the CRTC are generally assumed to be broad and unconstrained. Indeed, there has been no reported successful challenge (in a court) to a CRTC decision on procedural grounds since 1976.⁵⁸ The courts have struggled with the loose definitions of the

⁵³ Salter & Odartey-Wellington 793.

⁵⁴ D Barney, 'The Democratic Deficit in Canadian ICT Policy and Regulation' in M Moll and LR Shade (eds), *Seeking Convergence in Policy and Practice* (Ottawa: CCPA, 2004) 95 and 105.

⁵⁵ D Gutstein, *E.con: How the Internet Undermines Democracy* (Toronto: Stoddart, 1999) 74, 82-4, 88-98 in particular; D Barney, *Communication Technology* (Vancouver: UBC Press, 2007) 43-4, 51.

⁵⁶ L Mussio, 'Prophets Without Honour? Canadian Policy Makers and the First Information Highway' in D Robinson (ed), *Communication History in Canada* (Toronto: OUP, 2003), 81-3.

⁵⁷ Barney (2007) 61.

⁵⁸ Dunbar-Leblanc 271.

Broadcasting Act and taken a deferential approach.⁵⁹ However, this does not mean that the Act's purpose is to frustrate the legal rights of participants - the Act is not merely designed to prohibit or allow particular action, but is directed to both the CRTC and the licensed operators across the industry and acts as a high-level guide to the system.⁶⁰

One challenge that the CRTC will face in dealing with new media is the extent of its powers in relation to ISPs; as noted above, the new association of ISPs suggests that the CRTC cannot require them to make any payments, although the earlier New Media proceedings certainly saw this issue raised, and the CRTC has not hesitated in the past to find that an actor is subject to regulation as a BDU for those aspects of its business that constitute broadcasting.⁶¹ A more fundamental argument advanced by the ISPs, though, is that of the lack of parliamentary discussion on new media. Although they note that the consideration of the 1991 Act did not include this matter⁶² (open to debate depending on how you read the Act's supposed 'technological neutrality'), it can be countered that much parliamentary time has been spent on reports like Our Canadian Sovereignty only to see little or no legislative outcome, and therefore awaiting a legislative response may, in practice, mean the status quo will prevail. Those who would like to reopen the Act are also warned that one amendment may well trigger a range of contradictory proposals.⁶³ The question then is whether the system has reached the point at which such is desirable or necessary.

The Broadcasting Act itself is a relatively unconventional statute. It is essentially an enabling Act and sets out the goals that the CRTC will then implement through its decisions and orders. In recognising that Parliament would have some difficulties in the day-to-day regulation of a complex sector, the legislative branch chose to set the goals (social, political, economic) and then take a step back. The shaping of sections 3 and 5 of sections of the Act, though, is notable as an example of how a range of interest groups have influenced the regulation of Canadian broadcasting.⁶⁴ By lobbying for particular elements to be included in the statutory provisions, interest groups can plant a seed that they hope will grow into a range of future CRTC decisions. Indeed, Collins argued in the 1990s that "the story of broadcasting policy [in the UK and Canada] could (almost) be written as an account of the acts and actions of Parliament".⁶⁵ But will this remain the case if public participation withers and the CRTC follows the gospel of regulation as a last resort?

The technology-neutral definitions of the 1991 Bill were among the first in the world⁶⁶ but the IHAC approach⁶⁷ and the evolving ideas on telecommunications regulation can never be

⁵⁹ The most recent notable example of such is *Genex Communications v Canada (AG)* [2005] FCJ No 1440 (the "CHOI-FM" case).

⁶⁰ See e.g. discussion in Salter & Odattey-Wellington 126.

⁶¹ Salter & Odattey-Wellington 594.

⁶² CISP A [29].

⁶³ Salter & Odattey-Wellington 787.

⁶⁴ D Young, 'Discourses on Communication Technologies in Canadian and European Broadcasting Policy Debates' (2003) 18 Eur J of Comms 209, 230.

⁶⁵ R Collins, 'Reflections across the Atlantic: Contrasts and Complementarities in Broadcasting Policy in Canada and the European Community in the 1990s' (1995) 20(4) Can J of Comms 95.

⁶⁶ Young 223.

truly neutral, not least when the practical result is a set of regulated services and a set of unregulated services. For all the purported advantages of the NMEQ, these inconsistencies (whether you agree or disagree with them) and the avalanche of reports and proposals on new media certainly subject the Act to one of its greatest challenges yet.

⁶⁷ E.g. "It is critical that market forces determine what technology is appropriate for the provision of a particular service. Only in this way can Canadians receive full benefits from the convergence among technologies and industries now occurring in the economy" quoted in Young 224.